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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, *Petitioner*

v.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Respondents*

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Now comes petitioner and respectfully moves for leave to supplement as follows the petition for writ of certiorari herein:

1. Petitioner respectfully calls attention to the appended front page article in the Wall Street Journal of September 22, 1964, describing recent proliferation of the technique of acquiring government ownership through long term leases with payments of rent applied to the purchase price. The technique enables "the government involved to assume ownership when the lease expires." (Emphasis added in text.)

If such a lease were to vest independent control over operation of the facility in the private lessor and make the lessee's rent "obligation" contingent on profits, the transaction would be practically and legally indistinguishable from the instant case. If the parties attempted, incident to such a lease, to substitute local for federal authority over labor relations by proclaiming employees of the leased facility "government employees," the question of survival of National Act coverage would be identical.

Thus, the Journal survey provides concrete confirmation of the widespread potential of the Dade County gambit to defeat federally guaranteed collective bargaining in private public utilities *prior* to *actual* government ownership and operation.

2. Since filing of the petition herein a petition for writ of certiorari has been filed in *International Association of Machinists* v. *United Aircraft Corporation*, No. 533, this Term, which raises a cognate question concerning the impact of inaction by the General Counsel of the Board upon state court jurisdiction in preemption and conflict cases. Cf. p. 21, n. 15, of the Petition in No. 533 with p. 29 of the Petition herein.

Respectfully submitted,

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THE WALL STREET JOURNAL

Tuesday, September 22, 1964

Bypassing Voters

More States, Localities Avoid Bond Elections By Renting Facilities

Pension Funds, Other Bodies Do the Building; Argument Rages on Costs, Legality

Speedy Construction a Gain

By DONALD A. MOFFITT
Staff Reporter of THE WALL STREET JOURNAL

SAN FRANCISCO—On Oct. 6 citizens of Santa Cruz County, Calif., will ballot on a $4 million bond issue to build a new court house. But they won't accomplish much if they vote no. County supervisors already have made plans to get the court house built anyway—by a method that may well cost taxpayers more than the bond issue would.

The technique they are considering is an old one that's being revived by a growing number of cities, counties and even states to bypass the voters who have been defeating an increasing number of bond issues lately. It's a two-step procedure:

First, find somebody else to build the court house, school, jail, office building, golf course or whatever it is that's involved. That "somebody" can be a public employes' pension fund or a non-profit corporation created for the purpose. It can even be a governmental agency empowered to issue bonds of a type other than the "general-obligation" issues that must be approved by voters.

A Current Obligation

Then, rent the facility under a long-term lease that provides for the government involved to assume ownership when the lease expires; in most cases, this rent can be partially applied to the purchase price of the facility. Legally, rent payments under such a lease usually have been held to be a current government obligation, payable out of general tax revenues, with no special voter approval required. This is true even though the lease usually obliges the government involved to pay rent for quite as many years as it would have to pay interest on a voter-approved bond issue. It's even true if the rent payments go to pay interest and principal on "revenue" bonds issued by whatever body built the facility, as they often do.

But leasing arrangements nevertheless have been spreading as government officials have found it increasingly difficult to win bond elections. Santa Cruz County will set no precedent if it leases a court house citizens voted not to build. A few localities already have used the leasing technique to, in effect, reverse the results of a bond vote.

Bonds No—But Court House Yes

When the 58-year-old court house at Santa Rosa, Calif., was condemned as unsafe a few years ago, Sonoma County officials went to the people five times in three years with proposed bond issues to build a new one; the citizens voted down all five. But workmen nevertheless are now putting finishing touches on a new $4 million court house and jail. The county established a non-profit corporation to borrow money, build the facility, and lease it to the county.

In Los Angeles County, male lawbreakers are hauled off to a $17 million jail, built under a leasing arrangement after voters defeated a bond issue that had been proposed for its construction.

To be sure, such cases are still rare. Far more often, public officials arrange to have facilities built under leasing arrangements without ever putting a bond issue proposal up for a vote.

But many are frank to admit that they are turning to leasing because they fear a bond issue would be defeated. And their fears are far from groundless. Voters did defeat 37% of the $5.8 billion in state and municipal bond issues that were put up for approval last year, according to the Daily Bond Buyer, an investors' publication. That's up from a rejection rate of 30% in 1962, and only 25% in 1958.

"In the Midwest, we broke out with a rash of public rejections of general-obligation bonds," says William Ford, executive director of the Illinois Building Authority. "Some means had to be found to provide needed facilities."

Revenue Bonds Are Different

This building authority was organized by Illinois last year to become that "means." So far it has sold $25 million in revenue bonds. The money is being used, among other things, for buildings and equipment to be leased to state colleges and universities, and for a new penitentiary to be leased to the state prison system.

Revenue bonds are retired from income of the specific facilities built or acquired with bond proceeds. In many cases that income consists only of the rent paid by the government leasing the facilities. Nevertheless, revenue bonds legally are in a different class from general-obligation bonds, which are backed only by the "full faith and credit" of the government unit issuing them; unlike these bonds revenue bonds usually don't re-

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First, find somebody else to build the court house, school, jail, office building, golf course or whatever it is that's involved. That "somebody" can be a public employes' pension fund or a non-profit corporation created for the purpose. It can even be a governmental agency empowered to issue bonds of a type other than the "general-obligation" issues that must be approved by voters.

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As can well be imagined, this technique has been assailed vehemently by taxpayers, legal writers and even some judges—though more judges have upheld it when irate taxpayers have brought suit.

Even many governments using the leasing technique profess to dislike it, largely because of its cost. The effective interest rate on leases of government facilities ranges from a fraction to a full percentage point above the very low interest rate on general obligation bonds, which currently averages 3.3%.

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To be sure, such cases are still rare. Far more often, public officials arrange to have facilities built under leasing arrangements without ever putting a bond issue proposal up for a vote.

But many are frank to admit that they are turning to leasing because they fear a bond issue would be defeated. And their fears are far from groundless. Voters did defeat 37% of the $5.8 billion in state and municipal bond issues that were put up for approval last year, according to the Daily Bond Buyer, an investors' publication. That's up from a rejection rate of 30% in 1962, and only 23% in 1958.

"In the Midwest, we broke out with a rash of public rejections of general-obligation bonds," says William Ford, executive director of the Illinois Building Authority. "Some means had to be found to provide needed facilities."

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Revenue bonds are retired from income of the specific facilities built or acquired with bond proceeds. In many cases that income consists only of the rent paid by the government leasing the facilities. Nevertheless, revenue bonds legally are in a different class from general-obligation bonds, which are backed only by the "full faith and credit" of the government unit issuing them; unlike these bonds revenue bonds usually don't require voter approval.

"We haven't had a successful bond election for general public buildings since 1940," says John R. Leach, deputy chief administrative officer of Los Angeles County. "The voters will only go for things like hospitals and juvenile wards." General-obligation bond issues in the county must be passed by a two-thirds majority, and officials say the county's urban sprawl makes such a majority exceedingly difficult to get. Voters in one part of the county, they say, won't approve bonds that would go to build a court house or golf course

in another part of the county that may be 30 or 40 miles away.

So officials have taken advantage of a 1949 state law allowing public employes' retirement funds to invest in real estate sold or leased to governments. In the past six years the Los Angeles County Employees Retirement Association has built projects costing $87 million, including the $17 million men's jail and a $1.4 million golf course. It has spent $34.6 million on projects now under construction, including five more golf courses, underground parking lots and a court house, and has committed another $25 million for future projects.

All these projects are being or will be leased to the county. Thus they will add to county lease-purchase obligations that taxpayers already are feeling in the pocketbook. It's estimated that rent obligations, plus amounts set aside for eventual purchase of the rented facilities, account for nearly 20% of the increase in the county's property tax rate since 1959. The Los Angeles County rate currently is $2.40 per $100 assessed value, up from $2.09 in 1959; of the 31-cent increase, it's estimated, six cents was made necessary by lease-purchase commitments.

Some still bigger projects are now being planned for building under lease arrangements. Alameda County and the City of Oakland plan to lease jointly a $25 million sports coliseum being built by prominent local citizens (they include William F. Knowland, Barry Goldwater's state campaign manager).

Big Chicago Lease

Chicago and its surrounding Cook County will lease jointly an $87 million civic center which will house offices of many county and city departments. The center is being erected by Chicago's Public Building Commission, which sold revenue bonds to finance it.

Though no over-all measure of the trend is available, Alan V. Bartett, statistician for the Bank of America, estimates that in California alone the state and local governments have incurred "substantially more" than $200 million in lease-purchase obligations. But he complains that "nobody can find out what the debt is precisely, since most of it is relatively recent and municipalities don't report it as debt."

The municipalities are within their rights, under a California supreme court decision, in taking this view of leasing arrangements. In some other areas, however, there's still a question as to where leases belong in the legal distinction between current obligations of a Federal judge termed the classification of lease rentals as current obligations "a proposition in legal metaphysics that I cannot comprehend." Several legal writers are attacking it currently on essentially the same basis.

But this view is losing ground. A legal survey, already somewhat outdated, found that leasing of schools had been upheld recently in five states and ruled illegal in only two, while specific leasing arrangements for various other kinds of facilities had been upheld in all five states in which they had been challenged. The survey did find that state building authorities created to lease facilities to state agencies had been held valid in only four states and invalid in six, but the situation in one of the six, Illinois, has changed since the survey was taken. An Illinois building authority established in 1941 was held to be unconstitutional but the authority organized last year was held to be valid under a constitutional 1961 state law.

Other Criticisms

Legal technicalities aside, critics have other arguments against leasing. One, of course, is what they view as the questionable ethics of bypassing voters. Another, and frequently bitter, argument is based on cost. James M. Wiley, manager of Dean Witter & Co.'s municipal bond department and a resident of California's Alameda County, combines the two in attacking the county's plan to lease the new $25 million sports coliseum jointly with Oakland.

The county, says Mr. Wiley, is "being saddled with substantial non-voted debt and unnecessarily heavy taxes for years to come." He calculates the proposed 35-year lease on the coliseum will cost county taxpayers 4% in yearly interest for a total interest cost of $21,655,000. A 25-year, 3.5% issue of general obligation bonds, he says, would cost only $10,237,500 in interest.

The interest rate on lease rentals is calculated in different ways. If the organization building a facility issues revenue bonds, the government leasing the facility pays rent high enough to pay the interest on those bonds. If no bonds are involved, the government and the building organization simply agree on an interest rate in negotiations. When pension funds are involved there may be legal requirements; California law, for instance, specifies that pension funds must receive interest on their investments of at least three-quarters of one percentage point more than the going rate on U.S. Government bonds. The state consequently is paying nearly 5% interest on some of its leases of public buildings.

says William E. Davis, assistant county administrator. Since he estimates construction costs are increasing 5% to 8% yearly, he contends a speedy start under a leasing arrangement will save enough on building costs to offset part of the extra interest cost—besides which the county will save the several hundred thousand dollars it would cost to hold an election.

Alameda County, says Mr. Davis, already has saved money because of the flexible construction timing that leasing arrangements permit. The construction contract for a welfare building that the county leases from an employes' pension fund, he says, was awarded some years ago when there was a "minor slump in the construction industry. As a result, the low bid was $300,000 below the cost estimated by the architect. This was a very significant saving to the taxpayers."

Avoiding Complications

Robert W. Christensen, executive director of the Chicago Public Building Commission, says Chicago will lease its new $87 million civic center jointly with Cook County largely because the participation of two government units would make general-obligation bond financing complicated. Obviously the situation would be snarled considerably if Chicago voters approved a bond issue for the city's share of the project while county voters turned down a bond issue for their share, or vice versa. Leasing, he says, not only gets around this but provides a simple method of splitting the costs; county and city each pay rent on the offices they will use in the center.

In some areas, leasing has gained ground because state constitutions severely limit the amount of general-obligation bonds government units can issue even with voter approval. The Pennsylvania constitution limits bonded debt of school districts to 2% of their assessed valuation. Harold O. Spiedel, acting deputy superintendent of public instruction, says this is so little that "if some of our school districts had to go to general-obligation bonds, they just wouldn't be able to build anything at all."

Pennsylvania law permits school districts to establish non-profit "municipality authorities" to issue revenue bonds, build schools with the proceeds, and lease the buildings to school districts. A state-wide school authority operates in much the same manner, leasing schools to districts that, for one reason or another, don't wish their own authority. Since 1952, just under $2 billion worth of Pennsylvania school construction has been financed through these agencies, nearly two-thirds of it in the past six years.

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The municipalities are within their rights, under a California supreme court decision, in taking this view of leasing arrangements. In some other areas, however, there's still a question as to where leases belong in the legal distinction between current obligations of a government and long-term debt

The Legal Problem

And the question is crucial. Most states prohibit officials of either the state or local governments from incurring debts of more than a year—or, at least, debts that come due after the expiration of the officials' terms in office—without express voter approval. If leases were to be placed in this category, officials would have to arrange elections on leasing arrangements just as they do on general-obligation bond issues.

A good many people would like to put leases in this class. As far back as 1868, a [illegible] currently on essentially the same basis.

But this view is losing ground. A legal survey, already somewhat outdated, found that leasing of schools had been upheld recently in five states and ruled illegal in only two, while specific leasing arrangements for various other kinds of facilities had been upheld in all five states in which they had been challenged. The survey did find that state building authorities created to lease facilities to state agencies had been held valid in only four states and invalid in six, but the situation in one of the six, Illinois, has changed since the survey was taken. An Illinois building authority established in 1941 was held to be unconstitutional but the authority organized last year was held to be valid under a constitutional 1961 state law.

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For the Defense

Government officials have several arguments for leasing, besides the contention that it is the only way they can get facilities they need greatly but that aren't glamorous enough to appeal to voters. While many concede that leasing is costly, some argue that it isn't as costly as a simple comparison of interest rates would make it appear, and that in some cases leasing actually may save money.

If Alameda County were to hold a bond election for the new sports coliseum it will lease jointly with Oakland, the start of construction would be delayed a year or more, has saved money because of the flexible construction timing that leasing arrangements permit. The construction contract for a welfare building that the county leases from an employes' pension fund, he says, was awarded some years ago when there was a "minor slump in the construction industry. As a result, the low bid was $300,000 below the cost estimated by the architect. This was a very significant saving to the taxpayers."

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